

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
On-Briefs May 29, 2007

**JOHNNY D. HALL v. MIKE BRYANT, ET AL.**

**A Direct Appeal from the Circuit Court for Davidson County  
No. 06C-2199 the Honorable Hamilton Gayden, Judge**

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**No. M2007-00003-COA-R3-CV - Filed on August 28, 2007**

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The *pro se* Appellant, an inmate in the custody of the Tennessee Department of Correction, appeals the trial court's dismissal on a 12.02 motion of his U.S.C. § 1983 complaint for alleged violation of his right of access to the courts. Finding no error, we affirm.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed**

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Johnny D. Hall, *Pro Se*

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Joshua D. Baker, Assistant Attorney General, for Defendants-Appellees, Mike Bryant, et al

**OPINION**

Johnny D. Hall ("Plaintiff," or "Appellant") is an inmate in the custody of the Tennessee Department of Correction ("TDOC"). Mr. Hall is currently housed at the Riverbend Maximum Security Institute ("RMSI") in Nashville, Tennessee. Mike Bryant, Melba Espinosa, and Sandy Hall are all employees of TDOC who work at RMSI. Rickey Bell is the RMSI warden, and Roland Colson (together with Messrs. Bryant and Bell, Ms. Espanosa, and Ms. Hall, "Defendants," or "Appellees") is the Assistant Commissioner of Operations for TDOC.

Prior to the filing of the present action, in the case of *Johnny D. Hall v. Tennessee Department of Correction*, Mr. Hall filed a petition for a common law writ of certiorari in which he challenged the proceedings at his prison disciplinary hearing. TDOC moved to to dismiss the petition for lack of subject matter jurisdiction, and, by Order of June 23, 2006, the trial court dismissed the petition as untimely. The June 23, 2006 Order indicates that, although the trial court had received a late-filed response to the motion to dismiss, the trial court did consider Mr. Hall's

filing in reaching its decision to dismiss his petition. The trial court dismissed the certiorari petition for lack of subject matter jurisdiction because it was not filed within sixty days as required by T.C.A. § 27-9-102 and because the petition did not state that it was Mr. Hall's "first application for the writ" as required by T.C.A. § 27-8-106.

Following the dismissal of his petition for writ of certiorari, on August 23, 2006, Mr. Hall filed the present action—a 42 U.S.C. § 1983 Complaint, wherein he alleges that the Appellees violated his right of access to the courts as guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I §§ 8 and 16 of the Tennessee Constitution. In his *pro se* Complaint, Mr. Hall specifically asserts that he was denied the opportunity to meet with his inmate legal advisor on several occasions, that prison library staff were not properly trained to assist inmates with legal matters, and that the books in the prison library were either insufficient or outdated. Mr. Hall asserts that these conditions resulted in his certiorari petition being dismissed because he was not able to timely file a response to the Appellees' motion to dismiss same. Mr. Hall also contends that Appellees Colson and Bell were liable because they failed to remedy the alleged constitutional violations after being apprised of them.

On October 13, 2006, the Appellees filed a Tenn. R. Civ. P. 12.02(6) Motion to Dismiss the Complaint for failure to state a claim upon which relief may be granted. Specifically, the Appellees assert that:

The Plaintiff fails to state a claim for denial of access to the courts because Plaintiff filed a response to the motion to dismiss his common law writ of certiorari petition and therefore did not suffer any injury by virtue of the Defendants' alleged unconstitutional action.

Additionally, Defendants Colson and Bell move this Court to dismiss the complaint against them because the Plaintiff has not alleged that either defendant personally participated in or encouraged the alleged unconstitutional activity and liability in a § 1983 action cannot be based solely on the doctrine of *respondeat superior*....

On October 31, 2006, Mr. Hall filed a "Motion in Opposition to the Defendants' Motion to Dismiss," in which he asserts that his Complaint does state a claim because he suffered the injury of having his certiorari petition dismissed due to his being denied access to legal material and legal counsel. As to his complaint against Messrs. Colson and Bell, Mr. Hall asserts that he has stated a claim against these Defendants because, after being noticed of the allegedly unconstitutional activity against Mr. Hall, they did nothing. A hearing on the motion to dismiss was held on November 3, 2006. By Order of November 27, 2006, the trial court dismissed Mr. Hall's Complaint in its entirety. Mr. Hall appeals and raises three issues for review as stated in his brief:

1. [T]he trial court err[ed] stating that Plaintiff failed to state a claim [upon] which relief may be granted, because the court said that the

Plaintiff did not suffer any actual injury, by virtue of the Defendants' alleged unconstitutional action of denying the Plaintiff his right of access to the courts.

2. [T]he trial court err[ed] stating that the Plaintiff failed to state a claim because the trial court stated that Defendants Bell and Colson neither personally participated in or encouraged the alleged unconstitutional activity.

3. [T] trial court err[ed] in dismissing the Plaintiff's case because when each party relied upon an affidavit the motion to dismiss or summary judgment will be treated as a motion for summary judgment pursuant to T.R.C.P. 56....

We are cognizant of the fact that Mr. Hall is proceeding *pro se*. While a party who chooses to represent himself or herself is entitled to the fair and equal treatment of the courts, **Hodges v. Tenn. Att'y Gen.**, 43 S.W.3d 918, 920 (Tenn.Ct.App.2000) (citing **Paehler v. Union Planters Nat'l Bank, Inc.**, 971 S.W.2d 393, 396 (Tenn.Ct.App.1997), “[p]ro se litigants are not... entitled to shift the burden of litigating their case to the courts.” **Whitaker v. Whirlpool Corp.**, 32 S.W.3d 222, 227 (Tenn.Ct.App.2000) (citing **Dozier v. Ford Motor Co.**, 702 F.2d 1189, 1194-95 (D.C.Cir.1983)). *Pro se* litigants must comply with the same substantive and procedural law to which represented parties must adhere. **Hodges**, 43 S.W.3d at 920-21.

We first address Mr. Hall's third issue in which he asserts that, pursuant to Tenn. R. Civ. P. 12.02, this Court should apply the standard of review for summary judgment cases because the trial court considered evidence outside the pleadings. We disagree. There is nothing in the record to indicate that the trial court considered anything outside of the allegations of the complaint. In its November 27, 2006 Order, the trial court specifically states that, in reaching its decision, it considered the complaint, the motion to dismiss, and the response to the motion. These filings are all part and parcel of a Tenn. R. Civ. P. 12.02 motion to dismiss. In order to properly decide a motion to dismiss for failure to state a claim upon which relief may be granted, the trial court must consider and is limited by the allegations of the complaint. A motion to dismiss pursuant to Tenn.R.Civ.P. 12.02(6) for failure to state a claim upon which relief can be granted is the equivalent of a demurrer under our former common law procedure and thus is a test of the sufficiency of the leading pleading. **See Cornpropst v. Sloan**, 528 S.W.2d 188, 190 (Tenn.1975). The motion admits the truth of all relevant and material averments in the complaint but asserts that the statements do not constitute a cause of action. **See id.** at 190. In considering whether to dismiss a complaint for failure to state a claim, the court should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of fact therein as true. **See Huckeby v. Spangler**, 521 S.W.2d 568, 571 (Tenn.1975). A complaint should not be dismissed upon such a motion “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” **Fuerst v. Methodist Hospital South**, 566 S.W.2d 847, 848 (Tenn.1978).

The relevant portions of Mr. Hall's Complaint read as follows:

20, '06. On May 30, 2006, the Plaintiff, while having an active case in the courts, requested and was approved for legal assistance, but was denied his legal visits. The Plaintiff's request was for information on how to answer the Respondents' motion to dismiss his writ of certiorari, before June 9, '06, which was dismissed because deadline was missed. Then Plaintiff requested information on how to appeal this ruling, but had to file his appeal completely on his own without any legal assistance.

11. As Plaintiff has a 9<sup>th</sup> grade education and no kind of legal training, while on administrative segregation has no physical access to the institutional law library.

12. After having a short period of time to meet my deadlines enumerated about, I was prejudiced by the failure for adequate legal assistance and missed a court deadline, suffering an adverse effect.

13. This injury had a devastating effect on Plaintiff's First Amendment freedom that is not related to any penological concerns.

14. The Plaintiff was not able nor afforded the proper legal assistance.

15. Library staff not trained in any type of law nor have any degrees in law.

16. Library lacking prior or recent volumes of legal reference.

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18. This is an ongoing pattern of impairment that will bring forth other adverse infringements. This lack of resource indeed hampers Plaintiff's ability to present his appeal and other documents to the courts, as Plaintiff had to file his appeal and additional motions without any legal assistance.

19. The Defendants Roland Colson and Ricky Bell have knowingly and intentionally participated in this unacceptable pale of behavior as their positions of Assistant Commissioner of Operations and Warden, as to the denial of Plaintiff's grievances. (Grievance nos. 06-0481/180702 and 06-0536/181385) attached.

20. The Defendants Melba Espanosa and Mike Bryant overall caused the impairments by acts of omission. After being advised about the law library deficiencies.

In *Phifer v. Tennessee Bd. of Parole*, No. No. M2000-01509-COA-R3-CV, 2002 WL 31443204 (Tenn. Ct. App. Nov. 1, 2002), this Court discussed in detail a prisoner's right to access to the courts, to wit:

The Supreme Court of the United States recognizes the existence of a constitutional right of access to the courts and has identified the sources of the right of access in the prisoner context as the Due Process Clause, the Equal Protection Clause, and the First Amendment. *John L. v. Adams*, 969 F.2d 228, 231 (6th Cir.1992). *See also Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765 (1989); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974); *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747 (1969); *Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640 (1941).

The landmark case in the area of a prisoner's right of access to the courts is *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977).... [In *Bounds*,] [t]he United States Supreme Court explained that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers....” *Id.* 430 U.S. at 828, 97 S.Ct. at 1498 (footnote omitted). The decision in *Bounds* imposed an affirmative duty on states to assist inmates in gaining access to the courts by stating that states must “shoulder affirmative obligations to assure all prisoners meaningful access to the courts.” *Id.* 430 U.S. at 824, 97 S.Ct. at 1496. The Court further explained that access must not only be meaningful, but adequate and effective, providing a “reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts,” *Id.* 430 U.S. at 822, 97 S.Ct. at 1495, and noted some of the options of individual states in accomplishing this duty as providing access to a law library, hiring lawyers on a full- or part-time basis, and using law students, paralegals, or volunteers from the legal community to assist and advise prisoners.

*Phifer*, 2002 WL 31443204 at \*10 (footnote omitted).

The *Phifer* Court traces the evolution of this right to meaningful access to the courts from *Bounds* through the Supreme Court's decision in *Lewis v. Casey*, 518 U.S. 343, 355, 116 S.Ct. 2174,

2182 (1996), which decision limited the types of actions in which any affirmative duty exists to assist a prisoner in preparing his or her case, to wit:

The Court in *Lewis* also found that *Bounds* did not create any independent right of access to legal materials. The Court specifically found that *Bounds* did not establish a right to a law library or to legal assistance, but that “[t]he right that *Bounds* acknowledged was the (already well-established) right to access to the courts.” ... Meaningful access to the courts is the touchstone. It is the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts that is protected, not “the capability of turning pages in a law library.”

Most significantly, however, the Court in *Lewis* emphasized that a claim based on denial of access to the courts carries a requirement of actual injury.

The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents a court of law from undertaking tasks assigned to the political branches....

The injury must relate to the right of access to the courts. That is, the fact that a prison law library is without some materials does not establish an actual injury. The inmate must demonstrate that the alleged shortcomings hindered his efforts to pursue a legal claim. Essentially, the inmate must show that a nonfrivolous legal claim relating to his sentence or the conditions of his confinement has been frustrated or is being impeded in order to demonstrate an injury in fact resulting from denial of the right of access to courts.

*Phifer*, 2002 WL 31443204 at \*11 (footnotes omitted).

Applying the foregoing principles to the case at bar, Mr. Hall cannot show that he was denied access to courts or any injury resulting from such denial. His petition in the trial court was not lost or dismissed for failure to comply with a technical requirement. In fact, in the order dismissing Mr. Hall’s petition for writ of certiorari, the trial court notes that Mr. Hall filed a late response to the motion to dismiss, but that the trial court, nonetheless, considered this filing in reaching its decision. Likewise, in the order dismissing Mr. Hall’s § 1983 Complaint, the trial court states that Mr. Hall’s response is a “contemplative and competent challenge to the issues raised in the Department’s motion to dismiss....” Both the trial court and this Court have given full consideration to the issues raised by Mr. Hall. He has not been denied access to the courts. “No actual injury occurs without a showing that such a claim [challenging the conviction or conditions of confinement] ‘has been lost

or rejected, or that the presentation of any such claim is currently being prevented.” *Reinholtz v. Campbell*, 64 F.Supp. 721, 730 (W.D. Tenn. 1996) (quoting *Lewis v. Casey*, 518 U.S. 343, 356 (1996)). Furthermore, Mr. Hall has not alleged sufficient facts to show that the alleged unavailability of the materials he requested hindered his efforts to pursue a legal claim. *See Lewis*, 518 U.S. at 351. Rather, his filings in the trial court and in this court demonstrate an ability to clearly state his complaint and a basic knowledge of the law of due process, and equal protection. Therefore, even if access to legal materials were a protected right, we can find no indication that his case was hindered by the alleged unavailability of some materials.

Turning to the claims asserted against Messrs. Bell and Colson, we find that these claims were also properly dismissed. In *Bellamy v. Bradley*, 729 F.2d 416 (6<sup>th</sup> Cir. 1984), the United States Court of Appeals for the Sixth Circuit stated:

In *Hays v. Jefferson County*, 668 F.2d 869 (6<sup>th</sup> Cir.1982), we held that the § 1983 liability of supervisory personnel must be based on more than the right to control employees. Section 1983 liability will not be imposed solely upon the basis of *respondeat superior*. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Hays*, 668 F.2d at 872-74.

Bellamy, 729 F.2d at 421.

In his Complaint, Mr. Hall asserts that:

The Defendants Roland Colson and Ricky Bell have knowingly and intentionally participated in this unacceptable pale of behavior as their positions of Assistant Commissioner of Operations and Warden, as to the denial of Plaintiff's grievances....

Here, Mr. Hall's allegations against Messrs. Colson and Bell involve only their denial of his administrative grievances. There is no specific allegation that either of these Defendants encouraged, authorized or acquiesced in the claimed violation of Mr. Hall's rights. “[L]iability under § 1983 must be based on active unconstitutional behavior and cannot be based upon ‘a mere failure to act.’” *Shehee v. Luttrell*, 199 F.3d 295, 300 (6<sup>th</sup> Cir. 1999) (quoting *Salehpour v. University of Tennessee*, 159 F.3d 199, 206 (6<sup>th</sup> Cir.1998), cert. denied, 526 U.S. 1115, 119 S.Ct. 1763, 143 L.Ed.2d 793 (1999)).

For the foregoing reasons, we affirm the Order of the trial court dismissing Mr. Hall's

Complaint. Costs of this appeal are assessed against the Appellant, Johnny D. Hall, and his surety.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.